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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDRES CASTILLO, Defendant and Appellant.	B235445 (Los Angeles County Super. Ct. No. MA044013)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Judgment modified and, as so modified, affirmed.

Louisa B. Pensanti, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Andres Castillo appeals from the judgment entered following a jury trial in which he was found guilty of two counts of first degree burglary with a finding persons other than an accomplice occupied the residence when entry was made (Pen. Code, §§ 459, 667.5, subd. (c); counts 1 & 28),[1] nine counts of first degree home invasion robbery while acting in concert (§§ 211, 213, subd. (a)(1)(A); counts 2 through 8 & 30), nine counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 9 through 17), assault with a knife (§ 245, subd. (a)(1); count 18), four counts of child abuse (§ 273a, subd. (a); counts 19 through 22), committing a forcible lewd act on a child under the age of 14 with a finding of kidnapping where the movement increased the risk of harm to the child (§§ 288, subd. (b)(1), 667.61, subds. (a) & (d); count 25), kidnapping for ransom (§ 209, subd. (a); count 26), kidnapping to commit a forcible lewd act on a child under the age of 14 (§ 209, subd. (b)(1); count 27), and kidnapping to commit robbery (§ 209, subd. (b)(1); count 29).

The jury made a finding a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) (count 25) and findings appellant personally used a semiautomatic pistol within the meaning of section 12022.5, subdivision (a) (counts 1, 9-17, 19-22, 26 & 28) and personally used a firearm within the meaning of section 12022.53, subdivision (b) (counts 2-8, 26, 29 & 30). The jury made findings all the offenses were committed for the benefit of, or in association with, a criminal street gang. (§ 186.22, subd. (b)(1).)

At sentencing, the trial court imposed a total term of 225 years to life in state prison, consisting of eight fully consecutive terms of 25 years to life for the home invasion robberies in counts 2 through 8 and 30 (enhanced for gang and firearm use findings) and a fully consecutive term of 25 years to life for the kidnapping to commit a lewd act on a child under the age of 14 in count 27 (enhanced for gang and firearm use findings). The terms for the other counts were imposed concurrently and stayed pursuant to section 654.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

1. *The prosecution case.*

a. *The events of the home invasion robberies and kidnappings and other offenses.*

Viewed in the light most favorable to the judgment (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the trial evidence established in 2008 Jesus Z. and his wife Lilia C. lived in a Palmdale residence with their eight children, sons 15-year-old J.Z., 12-year-old B.R., and the toddler, D.Z., and daughters 12-year-old A.Z., 11-year-old Jul. Z., Jey.Z. and the baby, H.Z, as well as with Lilia C.'s brother, an adult, Gustavo C. Gustavo C. slept in the pool house in the back yard. As it was getting dark on November 5, 2008, two robbers, appellant and codefendant Diaz (Diaz), walked through the residence's unlocked front door.[2] They pointed their semi-automatic pistols at the family. Jesus Z., upstairs in a bathroom, saw a gunman from upstairs, climbed out a window and had a neighbor telephone the Los Angeles County Sheriff's Department. In the meantime, appellant and Diaz had everyone but Lilia C., who was holding the baby, and the toddler lay face down on the floor. Lilia C. sat on the sofa.

While Jesus Z. stood two doors away waiting for the deputy sheriffs, the robbers terrorized the family inside the residence. Appellant made threats to, and beat, 15-year-old J.Z and Lilia C.'s brother, Gustavo C. Appellant cut J.Z. on the neck with a knife. Appellant threatened to rape 11-year-old Jul.Z. and committed forcible lewd acts on her

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[2] Appellant was charged in the information with codefendants Jose Joel Perez (Perez) and Diaz. On entry, Perez was outside in a van with a cellular telephone with a walkie-talkie feature that he was using to speak frequently with Diaz and appellant. When they reported the robbers inside were ready to leave, Perez told them inside to kill the family and leave. Diaz was tried with appellant, and Diaz and appellant were charged with the same offenses. Perez was tried separately. Diaz was convicted as charged, with the exception of count 25, committing a forcible lewd act on a child under the age of 14 with gang and one-strike allegations, and of count 27, the kidnapping to commit a lewd act with a child under the age of 14 with a gang allegation. For Diaz, the trial court imposed a total term in state prison of 50 years to life. The codefendants have not filed notices of appeals.

in a bedroom. Codefendant Diaz had to stop appellant from further sexually assaulting her. The robbers made repeated demands for Jesus Z.'s money and drugs and had J.Z. and others search the house, garage and cars at gunpoint for money and drugs.

J.Z. turned over to Diaz $25,000 to $38,000 in cash Jesus Z. kept hidden in a linen closet. Lilia C. gave the robbers $500 from her diaper bag. Appellant took Gustavo C. outside to the pool house and obtained his savings, $1,000 in cash. Having failed to locate any drugs or more money, the robbers decided to leave just as deputy sheriffs contacted Perez, the lookout, outside on the street in a van. Appellant and Diaz took J.Z. out the front door with them, threatening bodily harm and that they intended to kidnap him for ransom. But appellant and Diaz saw the deputies out front, let go of J.Z. and fled through the residence's back yard with the family's money. The deputies arrested Perez and set up a perimeter, but appellant and Diaz escaped apprehension.

b. *The investigation.*

Diaz was the registered owner of the van. In the early morning hours of the following day, November 6, 2008, Los Angeles County Deputy Sheriff Christopher Bergo (Deputy Bergo) individually showed the family members two six-pack photographic identification displays. Deputy Bergo had a responding deputy who spoke Spanish assist with the identification procedures. Diaz's photograph was in the No. 4 position in one of the photographic displays. Lilia C. identified Diaz as one of the robbers. A.Z. said the No. 4 photograph in one display "looked like" Diaz, and J.Z. said Diaz looked "familiar." J.Z. could not describe the robbers' heights; he said one weighed about 250 pounds; the other weighed "around" 180 pounds. Jesus Z., Gustavo C., Jul.Z. and B.R. were unable to identify anyone in the displays.

Diaz was arrested. After his arrest, he apparently refused to disclose appellant's identity. Only approximately a year later did Deputy Bergo discover appellant's identity through a telephone call Perez made from the jail to the 59th Street, Los Angeles, residence of appellant's father. Once appellant was identified, the deputies were able to determine a latent fingerprint belonging to appellant had been lifted from a door of Diaz's van.

On August 18, 2009, Deputy Bergo showed the family members individually a six-pack photographic display containing appellant's photograph in the No. 4 position. Deputy Bergo testified it was a coincidence Diaz's and appellant's photographs ended up in the No. 4 position in the six-pack displays. Deputy Bergo explained he used a computer program to prepare the displays. The computer program randomly placed the suspects' photographs in the displays, and he had no control over the position in which a particular photograph appeared.

In the photographic identification procedure, Lilia C. identified appellant as the other robber who had entered her residence. J.Z. circled appellant's photograph in the No. 4 position and said the man depicted there "looked the same as the guy that was hitting [him] and his uncle," Gustavo C. Jul.Z. identified appellant as her assailant, and B.R. said appellant "looked like" the robber who cut J.Z.'s throat during the robberies.[3]

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[3] At the preliminary hearing, Lilia C. identified appellant and Diaz in court as the robbers. She said Diaz was short and weighed about 170 pounds and was the defendant in court who had no hair. She said during the robbery, appellant had been wearing a beige shirt, black pants and a black baseball cap. Appellant and Diaz spoke to her in Spanish but spoke in English into the cellular telephone/walkie-talkie they had, and appellant spoke English to J.Z. The robbers were inside her residence for about 40 minutes. Gustavo C. identified Diaz in court as one of the robbers, but he could not identify appellant. Gustavo C. explained during the robbery he lay face down with his sweatshirt hood over his head. During the robbery, when he saw appellant, appellant had part of his shirt pulled all the way up to under his eyes, and later appellant had kicked him in the face. Eventually, appellant's shirt came down, but Gustavo C. did not see appellant's face. Gustavo C. said appellant was the robber who took him to the pool house and threatened to rape Jul.Z. The robbers spoke English. Gustavo C. claimed prior to the preliminary hearing testimony, Deputy Bergo and the prosecutor told him the robbers would be in court. J.Z. identified appellant and Diaz in court as the robbers. Appellant was the robber who took J.Z. upstairs to look for Jesus Z. and to other locations and hit him with the gun, punched him and cut him with a knife. Appellant was the man who sexually assaulted his sister and grabbed J.Z. in order to kidnap him as the robbers went out the front door. Diaz was the robber who took J.Z. upstairs after demands for money and marijuana, and the man who held him at gunpoint when J.Z. found a large amount of cash in the linen closet. J.Z. said he believed the robbers were there asking for money because they saw how large their residence was. Appellant had his face covered with a zippered sweatshirt or sweater for about 25 minutes of the

On September 9, 2009, appellant was arrested.

c. *At trial.*

Jesus Z. testified he was a San Fernando Valley pool contractor who kept a considerable amount of cash hidden at home. He and his family members denied he and Lilia C. played any role in the illicit drug trade. The deputy sheriffs testified there was no evidence of drug dealing at the residence.

At trial, Lilia C. identified appellant and Diaz as the robber-assailants. Jesus Z. identified appellant and Diaz as the robbers, but it was apparent he had only seen one robber for the briefest moment and earlier had identified appellant as the robber arrested at the van, when that robber was Perez. Gustavo C. identified appellant as the robber who cut J.Z. but then admitted he did not see that, and his testimony was stricken. Gustavo C. claimed the photographs he was shown previously did not accurately portray the robbers' appearances, but he remembered what appellant and Diaz looked like from the robbery. A.Z. testified she had a good opportunity to observe the robbers and identified appellant as one of the robbers. B.R. testified he recognized appellant from the robbery. Jul.Z. testified appellant was the robber who cut J.Z. and committed the forcible lewd acts on her and threatened to rape her.

Immediately before trial, the trial court ordered appellant's fingerprints re-rolled at the request of the prosecution's forensic fingerprint expert. Appellant refused, and the jury was instructed a defendant's efforts to suppress evidence may be considered as evidence demonstrating consciousness of guilt.

d. *The gang evidence.*

Deputy Sheriff Jason Bates (Deputy Bates), a gang expert, testified to the elements of the gang enhancements. He opined the home invasion robberies and other offenses were committed for the benefit of, and in association with, a criminal street gang, a Los Angeles South Central Hispanic gang by the name of Florencia 13, a criminal street gang.

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approximate 40-minute robbery. J.Z. recognized the defendants as the robbers because he recalled seeing them during the robbery. Few of the details of the preliminary hearing testimony was later elicited at trial.

He gave his opinion appellant and Diaz were Florencia 13 gang members. The bases for his opinion were in 2007 and 2008, appellant and Diaz had admitted to sheriff's deputies they were Florencia 13, and they had gang tattoos and lived within the territory of the Florencia 13 gang. In particular, appellant had his torso and neck covered with Florencia 13 insignia and gang-related tattoos. In 2007, appellant's girlfriend Cristal Casado (Casado) made a criminal report about an argument she had with appellant to Los Angeles County Deputy Sheriff Juan Rodriquez (Deputy Rodriguez). In the report, she told the deputy appellant was a Florencia 13 gang member who had the moniker Rascal. Two other bases for Deputy Bates opinion were that appellant was listed as Florencia 13 in the Los Angeles County Jail's "rollcall" documents containing a list of gang members' gang affiliations for jail administrative purposes and in 2009 appellant had identified himself at the Wayside Honor Rancho as a member of the Florencia 13 gang.

2. *The defense.*

a. *Appellant's defense.*

Appellant declined to testify, and trial counsel argued misidentification.

Casado testified to an alibi for appellant. She claimed on November 5, 2008, they were celebrating the birthday of appellant's Down Syndrome brother, and she was with appellant all day. At the time of the robbery, they were cutting cake with appellant's brother, mother and aunt, or at the Maywood residence of his Uncle Tomas.

With respect to the 2007 claim of gang affiliation, Casado recanted any statements she made to Deputy Rodriquez concerning appellant's gang affiliation and denied appellant was a gang member. To bolster her claim she lied in 2007, she testified she later pled guilty to filing a false police report concerning that criminal complaint.

Casado was impeached with Deputy Rodriquez's rebuttal testimony Casado had identified appellant as a Florencia 13 gang member with the moniker of Rascal.

b. *Diaz's defense.*

At trial, Diaz testified on his own behalf. He admitted he, appellant and Perez had obtained information from "high level drug dealers" about Jesus Z. They drove to Palmdale because they were told Jesus Z.'s wife had planned a robbery as she was leaving her husband. She wanted the robbers to take their cash and the $1,500,000 worth of cocaine that was at their residence. The plan was that the robbers would split the proceeds of the robbery with the wife, with the three of them taking the money they earned back to Los Angeles. Diaz admitted he knew appellant from the neighborhood and through their gang affiliation, but he denied he was currently a gang member, claiming before 2007 he had a dispute with the gang that arose during prison incarceration. Currently, he was housed in the jail with the other gang keep-aways.[4] He denied the charged offenses were committed for the benefit of, or in association, with any gang or Florencia 13. He said he, Perez and appellant planned to keep all the proceeds of the robbery, the $35,000 they obtained, for themselves; there was no plan to share with Florencia 13.

In his testimony, Diaz minimized his participation in the robbery/kidnappings, even though he was considerably older than appellant, age 37, and was a long-time Florencia 13 gang member. He claimed appellant made the arrangements for the robbery with the high level drug dealers, and there was no plan to kidnap J.Z. or to sexually assault one of the women. He claimed committing sexual offenses on crime victims violated the gang "code." On arrival at the residence, there were more children present than was disclosed by the high level drug dealers, and the scene became chaotic, with crying and yelling children. Appellant was the robber who covered his face initially

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[4] Diaz claimed he had a "green light out on him." Los Angeles County Deputy Sheriff Aaron Watson testified the location of appellant's jail housing was a security area, and the inmates there all were segregated for their own protection by reason of threats from other gang members. The reasons for their segregation were many, but some were housed there as they were testifying against other gang members.

during the robbery. Diaz claimed when appellant committed the most brutal acts of the robbery, he was busy elsewhere or not in the room. He had stopped the sexual assault on Jul.Z. and did not see appellant committing the other most violent acts. Diaz was ready to leave almost upon entry, but he and appellant were previous partners in crime, and he did not feel he could leave the residence without appellant, who he speculated would have refused to leave.

CONTENTIONS

1. *Prosecutorial misconduct.*

Seeking to impeach Casado concerning her testimonial claims appellant was not a gang member and she had lied to Deputy Rodriquez, the prosecutor asked Casado whether in 2007 she had reported an argument she had with appellant to Deputy Rodriquez. The witness replied she made a complaint. The prosecutor then inquired, "*Isn't it true you told the deputy that [appellant] got mad, slapped you in the face, grabbed a black extension cord and [appellant] wrapped the extension cord around your neck*?" The trial court immediately interrupted the proceedings and called trial counsel and the prosecutor to the sidebar out of the presence of the jury. When the trial court resumed the proceedings before the jury, it instructed the jury: "All right folks, that last portion . . . about the alleged attack on this witness is stricken."

Casado never answered the prosecutor's inquiry, and the prosecutor did not refer to the 2007 choking incident again. The jury was instructed with CALJIC No. 1.02, requiring that jurors ignore evidence stricken by the court.

Appellant contends the italicized inquiry above constitutes prosecutorial misconduct, requiring a reversal. He argues the underlying incident of domestic abuse was patently inadmissible, and the admonition given by the trial court would not have undone the harm caused by the prosecutor's question. He urges the damage done by the stricken inquiry was so severe a reversal is required.

a. *The relevant legal principles*

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (*Ibid*.)" (*People v. Smithey* (1999) 20 Cal.4th 936, 960 (*Smithey*).)

It is misconduct for a prosecutor to intentionally elicit inadmissible testimony. (*Smithey*, *supra*, 20 Cal.4th at p. 960.)

b. *The analysis.*

Immediately after the prosecutor made his inquiry, at sidebar, the trial court had the prosecutor's make an offer of proof. After listening to the proffer, the trial court said it did not want to launch into a full-blown trial on the underlying incident of domestic abuse that precipitated Casado's 2007 criminal complaint. All that was directly relevant to their proceedings was Casado's claim appellant was a gang member.

During the side bar conference, the trial court indicated issues surrounding the 2007 complaint were raised previously only in the context of a discovery issue. It resolved trial counsel's earlier complaint of no discovery of the 2007 police report, and ascertained both trial counsel had obtained the discovery. The trial court ruled the underlying domestic abuse was inadmissible pursuant to Evidence Code section 352. However, the trial court permitted the prosecutor to make a limited showing of the reliability of the complaint by attempting to elicit from Casado she made the report because she was afraid -- appellant had told her if he was arrested for domestic abuse, he would have his homeboys, the Florencia 13, kill her. The prosecutor was also permitted

to ask Casado whether in 2007, Casado told Deputy Rodriquez appellant belonged the Malditos clique of Florencia 13, and his moniker was Rascal.

During the sidebar conference, appellant's trial counsel objected the prosecutor's inquiry was "improper impeachment."

" Ordinarily, the failure to object specifically on grounds of [prosecutorial] misconduct and to seek an admonition forfeits the claim unless an admonition would not have cured the harm. [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1037-1038.)

In this instance, appellant did not object on the required specific grounds of prosecutorial misconduct. Nor is this a case where the bell could not be unrung. However, without a request, the trial court struck the question and Casado's reply. Although appellant did not request an assignment of misconduct or an admonition that the jury disregard the impropriety, the objection trial counsel made provided the trial court an opportunity to admonish the jury to disregard what it then determined to be unduly prejudicial evidence. (See *People v. Young* (2005) 34 Cal.4th 1149, 1186.) The trial court took advantage of the objection to rule on the admissibility of the testimony and then admonished the jury to disregard it.

While the issue was preserved for appeal, in the absence of a prior ruling, Casado's reply was not clearly inadmissible evidence. The prosecutor wanted to bolster the credibility of Casado's 2007 claim appellant belonged to the gang by elucidating all the circumstances of her complaint and showing Casado's 2007 claim about appellant's gang affiliation was reliable. It is not misconduct for a prosecutor to seek to introduce arguably relevant evidence, even where trial court eventually determines such evidence is more prejudicial than probative pursuant to Evidence Code section 352.

Also, given appellant's egregious and violent conduct during the robberies, suggesting to the jury that appellant had engaged in one, remote incident of domestic abuse would not have affected the verdicts. And, otherwise, the record contains no evidence the prosecutor engaged in a pattern of prosecutorial misconduct during trial

denying appellant a fair trial.[5] In any event, no prejudice is shown as the jury was instructed to disregard the question, and presumably the jury followed that instruction. (*Smithey, supra*, 20 Cal.4th at p. 961.)

2. *The extrajudicial identifications.*

Citing the seminal case of *Manson v. Brathwaite* (1977) 432 U.S. 98, appellant contends the trial court erred by admitting the extrajudicial eyewitness identifications of appellant. He argues in the context of various factors, the extrajudicial eyewitness identifications of appellant were unreliable.

a. *The relevant legal principles.*

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.)

If the defendant fails to show that the identification procedures were unduly suggestive, we need not address any arguments regarding the identifications' reliability under the totality of the circumstances. (*People v. Cook* (2007) 40 Cal.4th 1334, 1355; *People v. Cunningham, supra*, 25 Cal.4th at p. 989; see also *Perry v. New Hampshire*

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[5] We are not impressed that subpoenaing trial counsel was misconduct. On appeal, appellant cites no authority for such a proposition, and apparently, Ms. Pensanti was constantly engaged in other trials. After the lapse of time following the verdict, the prosecutor was not necessarily acting amiss in attempting to secure Ms. Pensanti's appearance so as to give the trial court the opportunity to conduct the sentencing proceedings. The trial court appropriately ordered the subpoena quashed and, without making an issue of trial counsel's complaint about the subpoena, simply proceeded with the hearing on the new trial motion and sentencing.

(2012) ___U.S. ____, 132 S.Ct. 716, 725-726, 181 L.Ed.2d 694 [explaining the decision in *Manson v. Braithwaite, supra*, 432 U.S 98 and making clear the reliability test set out in *Manson* concerned the appropriate remedy after the police use an unnecessarily suggestive identification procedure].)

b. *The analysis.*

It is settled where a defendant raises on appeal a challenge to an identification procedure on grounds it is unduly suggestive, the failure to object in the trial court on the same grounds waives the point for the appeal. (*People v. Medina* (1995) 11 Cal.4th 694, 753; see also, Evid. Code, § 353.) There was no objection or motion made before or during trial to exclude the extrajudicial or in-court identifications on the due process grounds the identification procedures were impermissibly or unduly suggestive and unreliable. Accordingly, the contention is forfeited.

Furthermore, this court is unable to comment on the merits. On appeal, appellant explicitly assumes there was no impermissibly or unduly suggestive eyewitness identifications and he argues only the second prong of the due process test for exclusion of an eyewitness's identification. But on this record, we cannot determine whether the identification procedures were unduly suggestive. The specifics that might lead this court to such a conclusion were never developed before trial or during cross-examination at trial so as to permit an examination of that issue, e.g., how Deputy Bergo conducted each of the six-pack identification procedures and the admonitions given the eyewitnesses. Moreover, without the prerequisite finding of an impermissibly suggestive identification process, the applicable test does not allow this court to reach the issue of a lack of reliability, which is the only argument appellant makes on appeal. The contention necessarily fails. (*People v. Cook, supra*, 40 Cal.4th at p. 1355; *People v. Cunningham, supra*, 25 Cal.4th at p. 989.) Moreover, the trial court was under no duty sua sponte to address this issue in the absence of a request by trial counsel. (*Perry v. New Hampshire, supra*, 132 S.Ct. at p. 725.)

3. *The request for an Evans lineup.*

In a timely fashion, prior to the preliminary hearing, appellant's preliminary hearing counsel, Mr. Rojas, requested an *Evans* lineup with respect to three eyewitnesses, Lilia C., J.Z. and B.R. (*Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*).) On appeal, appellant contends the trial court abused its discretion by failing to afford him the requested lineup.

a. *The relevant legal principles.*

In *Evans, supra,* 11 Cal.3d at page 625, the Supreme Court held that the due process clause requires the trial court, in an appropriate case, to grant a defendant's timely request for a pretrial lineup. The right to a lineup is not absolute, however. Rather, it arises "only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve." (*Ibid*.) The decision whether to order a pretrial lineup rests within the sound discretion of the trial court. (*Ibid*.; see *People v. Williams* (1997) 16 Cal.4th 153, 235-236.) An *Evans* lineup is regarded as a type of defense discovery. (*Evans, supra,* at p. 621.)

Discretionary interlocutory writ review is available after the magistrate has denied an *Evans* motion. (See *People v. Mena* (2012) 54 Cal.4th 146, 152 (*Mena*).) The failure to obtain writ review after the denial of an *Evans* motion does not preclude a defendant from seeking review of the magistrate's ruling on appeal. (*Id.* at p. 158.) However, on appeal, the question is not merely one of whether there was an abuse of discretion. The error is additionally evaluated under California's standard of prejudice in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*Mena, supra,* at p. 162.) If there is an abuse of discretion, the appellate court then conducts a *Watson* analysis: whether the appellant has established on the particular record, but for the trial court failure to order the lineup, would appellant have obtained a more favorable result. (*Mena, supra,* at p. 166.)

b. *The analysis.*

The record fails to support a reversal. We do not have to discuss whether the magistrate abused his discretion by finding no reasonable likelihood of a misidentification. At trial, Diaz identified appellant as the other robber who entered Jesus Z.'s residence. Diaz also testified he and appellant were previous partners in other crimes and knew each other through their gang affiliation, the neighborhood and appellant's older brothers. Such evidence, particularly Diaz's identification of appellant as his fellow robber, provides overwhelming evidence of appellant's guilt. It is not reasonably probable given Diaz's testimony, appellant's latent fingerprint on Diaz's van, and Perez's telephone call to the residence of appellant's father that appellant would have obtained a better result but for the magistrate's ruling.

4. *Appointing a Spanish interpreter for appellant.*

Appellant contends he is entitled to a reversal as the trial court failed to discover early on in the proceedings whether he needed a Spanish interpreter and then failed to advise him of, and obtain a waiver of, the interpreter before any critical proceedings concerning his trial.

a. *The relevant legal principles.*

"A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (Cal. Const., art. I, § 14.) "However, an affirmative showing of need is required." (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453 (*Raymundo B.*).) The defendant bears the burden of showing the defendant does not understand English. (*Id*. at p. 1456.) Although the court must appoint an interpreter if the defendant meets this burden, the court enjoys considerable discretion in initially determining whether an accused's comprehension of English is so minimal as to render the services of an interpreter necessary. (*People v. Carreon* (1984) 151 Cal.App.3d 559, 566-567, overruled on another point in *People v. Rodriquez* (1986) 42 Cal.3d 1005, as stated in *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1473; see *People v. Estany* (1962) 210 Cal.App.2d 609, 611.)

Factors relevant to this determination include the defendant's request for an interpreter, whether one has previously been provided, and the defendant's birthplace, community, level of education in the United States, and employment history. (See *People v. Aguilar* (1984) 35 Cal.3d 785, 789, fn. 4 (*Aguilar*); *Raymundo B., supra*, 203 Cal.App.3d at p. 1455.) We review a trial court's refusal to appoint an interpreter for a defendant for an abuse of discretion. (*Raymundo B., supra*, at pp. 1453, 1455-1456, 1458.)

b. *The analysis.*

The contention is not well taken. Appellant cites as authority for a reversal, the cases of *Aguilar, supra*, 35 Cal.3d at p. 794 and *People v. Chavez* (1981) 124 Cal.App.3d 215, 227, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7 (*Chavez*). He argues in the first instance advice of, and a waiver of, the interpreter must appear on the record. This is not the state of the law. The right to an interpreter found in article 1, section 14, of the California Constitution arises only on a showing of need by a non-English speaking criminal defendant. No such showing was made here. The advice of the right and a waiver is required only after need for an interpreter is established and a trial court deprives a defendant of his own interpreter during the proceedings. (See *Raymundo B. supra*, 203 Cal.App.3d at p. 1453.)

Aguilar and *Chavez* are distinguishable as in both cases, the trial court had already appointed an interpreter upon a showing of need. The initial appointment was not at issue. The courts there held that once the threshold showing of need is established, it is reversible error to deprive a defendant of his interpreter during critical criminal proceedings without the advice of, and a waiver of, the right to the interpreter.

Here, appellant proceeded through the preliminary hearing and trial without any indication he failed to understand English. At no time did his preliminary hearing counsel, Mr. Rojas, or trial counsel, Mr. Morrow, request an interpreter. The probation report indicates appellant was born in the United States, and presumably, he was educated here. Appellant's father and girlfriend spoke English. According to the trial witnesses, appellant spoke English during the robberies to his fellow robbers and to

Lilia C.'s children, who spoke English. During the proceedings, appellant responded appropriately to personal inquiries by the trial court and to the custodial personnel's orders given to him in English. Appellant appeared to be appropriately conferring with trial counsel during the trial and during other proceedings.

On August 13, 2010, the jury returned its verdicts. On September 2, 2010, appellant notified the trial court he had hired new trial counsel to represent him at sentencing, Ms. Pensanti. On October 27, 2010, he appeared with an associate of Ms. Pensanti's as Ms. Pensanti was engaged in a trial, and he had this counsel request a Spanish interpreter. The trial court asked for a statement of the specifics of appellant's need, but counsel's reply was evasive. The trial court initially denied the request.

On December 15, 2010, Ms. Pensanti obtained the trial transcript necessary to prepare a motion for new trial, which she filed on April 14, 2011. On April 14, 2011, apparently at the suggestion of the prosecutor, appellant began appearing with a court-appointed Spanish interpreter.

On June 22, 2011, Ms. Pensanti argued the motion for a new trial. Inter alia, she urged appellant had needed a Spanish interpreter during trial, and none had been requested for him. She said appellant "has a limited understanding of the English language," which affects his "understanding or comprehension of" the proceedings and he "was unable to understand his constitutional rights." She urged appellant spoke and understood "basic English," but he did not understand "the technical terms associated with the judicial process" and was not fully aware of the proceedings against him.

As the trial court observed in denying the motion for new trial, there was no pretrial or trial request for an interpreter, and the request was made only after appellant's convictions. During the proceedings, there was never any issue of appellant's failing to understand English.

The trial court did not abuse its discretion by sua sponte failing to appoint an interpreter for appellant at an earlier date. Appellant's background and conduct during the trial indicated he was fluent in English, and the belated request was just a ploy to obtain an issue that might lead to a reversal on appeal. Appellant conducted himself in

court as if he were English-speaking and appropriately replied to the trial court and conferred with his trial counsel. His background indicated he was fluent in English. We are not concerned he may not have thoroughly understood all the legal principles at play during the trial proceedings; undoubtedly, any legal principles he needed to understand were explained to him by his preliminary hearing and trial counsel.

5. *Ineffective trial counsel.*

Appellant contends he was denied his Sixth Amendment right to the effective assistance of trial counsel. He raises two claims of ineffective counsel: (1) preliminary hearing counsel Mr. Rojas failed to file a petition for a writ of mandate before the preliminary hearing seeking review of the magistrate's denial of the *Evans* motion for a physical lineup (*Evans, supra*, 11 Cal.3d 617); and (2) Mr. Rojas and Mr. Morrow failed to advise appellant of his constitutional right to a court-appointed interpreter and request the interpreter on appellant's behalf.

a. *The relevant legal principles.*

"In order to establish ineffective assistance of counsel, a defendant must first show that his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [104 S. Ct. 2052, 80 L. Ed. 2d 674]; *People v. Weaver* [(2001)] 26 Cal.4th [876,] 925.) Second, the defendant must demonstrate prejudice flowing from counsel's act or omission – i.e., a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*In re Sixto* (1989) 48 Cal.3d 1247, 1257 [259 Cal. Rptr. 491, 774 P.2d 164], citing *Strickland*, *supra*, 466 U.S. at p. 694 [104 S. Ct. at p. 2068].) 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' (*In re Sixto*, *supra*, at p. 1257.)" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1157, criticized on other grounds in *People v. Farley* (2009) 46 Cal.4th 1053, 1117.)

If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; see also *People v. Vines* (2011) 51 Cal.4th 830, 876.)

b. *The analysis.*

The record fails to support a finding of constitutionally ineffective trial counsel. As for failing to file an extraordinary writ, Mr. Rojas undoubtedly failed to seek writ review of the denial of appellant's *Evans* motion as there was little likelihood it would succeed. When Mr. Rojas requested the *Evans* lineup, what was known about the potential trial evidence was that there were three eyewitnesses identifications during extrajudicial six-pack photographic identification procedures. There was no hint that the identification procedures were conducted in such a way as to be impermissibly suggestive. The mere fact appellant's photograph was in the No. 4 position in the display was not unduly suggestive. The three eyewitness identifications were presumably conducted independently and were cross-corroborating. Also, at that time, there was further corroborating evidence of appellant's identity. From the jail, subsequent to the robbery, Perez had telephoned the residence of appellant's father. There was no reasonable likelihood of a misidentification that a live lineup would have cured. Thus, there is a satisfactory tactical reason why Mr. Rojas failed to seek the interlocutory writ.

Also, Mr. Rojas may have been aware of the decision in *Mena, supra*, 54 Cal.4th 146, which settled that a defendant can raise the issue of the denial of the *Evans* motion on appeal.

In fact, the live lineup was more likely to hurt appellant than help him. Several of the eyewitnesses had an adequate opportunity to see appellant during the robberies. Having a photographic lineup procedure and then having the eyewitnesses once again identify appellant as the robber in a physical lineup would have only further bolstered the credibility of the identifications. Mr. Rojas may well have concluded that a better means of defense was to cross-examine the witnesses during the trial as to the potential

infirmities in their identifications, and by that means to launch a defense to the eyewitness identifications. After the California Supreme Court decided the *Mena* case, it was settled a defendant was not precluded from raising the issue of the trial court's abuse of discretion on appeal, albeit with the additional burden of showing prejudice pursuant to *Watson*. (*Watson, supra*, 46 Cal.2d at p. 836; see also *Mena, supra*, 54 Cal.4th at p 162.)

As for the failure to request a Spanish interpreter for the proceedings, this record demonstrates the request would have been futile as appellant was fluent in English and needed no interpreter. Ms. Pensanti never asked Mr. Rojas or Mr. Morrow to explain the omissions. There are satisfactory tactical explanations in the record explaining why counsel failed to act in the manner complained of. The contention fails.

6. *An unauthorized enhancement.*

In count 27, appellant was found guilty of kidnapping for the purpose of committing another crime (§ 209, subd. (b)(1)), i.e., the forcible lewd act with a child under the age of 14 (§ 288, subd. (b)(1)), with the finding of a gang enhancement (§ 186.22, subd. (b)(1)). At sentencing, the trial court imposed a term of 15 years to life for the kidnapping. It imposed an additional 10 years for a section 12022.53, subdivision (a), firearm use enhancement.

On count 27, the jury made no true finding of the firearm enhancement.

The People request this court to vacate the 10-year term imposed for the use of a firearm (§ 12022.53, subd. (b)) as there was no firearm use finding in count 27, and the enhancement is thus unauthorized.

This court agrees with the People's analysis and will make the order vacating any finding of an enhancement and the unauthorized 10-year term. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007-1008; *People v. Harper* (2003) 109 Cal.App.4th 520, 524-529.) Appellant's total term amounts to a term of 215 years to life.

DISPOSITION

The term imposed for the 10-year firearm use enhancement (§ 12022.53, subd. (b)) for count 27, (aggravated kidnapping) is vacated, making the term imposed for count 27 a term of life with a minimum period of parole eligibility of 15 calendar years pursuant to section 186.22, subd. (b)(5).

In all other respects, the judgment is affirmed as modified.

The superior court shall cause its clerk to prepare and send an amended abstract of judgment to the Department of Corrections, stating the term imposed for count 27, a violation of section 209, subdivision (b)(1), is a term of life with a minimum parole eligibility term of 15 years pursuant to section 186.22, subdivision (b)(5).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.